In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

20989

CHARLES E. SMITH,

Appellant

vs.

STATE OF IDAHO and PAUL W. BRIGHT, Sheriff of Ada County, Idaho,

Appellees.

Appeal from the District Court of the United States
for the District of Idaho
Southern Division
Honorable Ray McNichols, Judge

BRIEF OF APPELLEES

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SUBJECT INDEX

TABLE OF CASES

Page

TEXT BOOKS

STATUTES

STATEMENT OF CASE

On Appellant's Statement of Case on page 2 of his brief, reference is made to his contention that he was not furnished sufficient time in the state court proceeding to produce certain evidence. This statement is not supported by the record and the record reveals the exact contrary. The transcript of the lower state court proceedings vividly notes that Appellant was granted repeated continuances and was in fact granted continuances to the date sought by his counsel. This Appellees' brief on pages 2 and 3, infra, refers directly to this proposition.

It should be further noted that when Appellant speaks on page 4 of his brief that the demanding papers contain the phrase, "information and belief," the criminal complaint of the Missouri prosecutor only contains the phrase in the verification.

ARGUMENT

I

THE STATE TRIAL COURT DID NOT REFUSE APPELLANT AMPLE TIME TO PREPARE FOR HIS HEARING.

Appellant's first issue relates to Federal District Judge Ray McNichols' refusal to allow him to take additional depositions and the refusal to permit Appellant to again re-litigate his cause de novo in a new evidentuary hearing.

His argument on page 8 of his brief is apparently directed towards his belief that he was not granted sufficient time to prepare for his hearing in 1963 before the Ada County Court in the State of Idaho. However, reference to the State Court transcript readily disposes of this contention. Appellant's counsel simply requested a continuance until the following Monday in order to obtain one further item of evidence (Tr. p. 4, L. 7-12), which was granted by the State Court. (Tr. p.7, L. 27-29.) The item was not directed to evidence on the issue of presence in the demanding state, but to the existence of a death certificate. (Tr. p.4, L.17-19.) Furthermore, the state court indicated in unequivocal language that Appellant had been granted a previous continuance and that he should be ready to commence his cause at the date requested by his counsel. (Tr.p.7, L. 11-

29; p. 8, L.2-5.) Appellant's major reliance is on the 1963 Opinion of Townsend v. Sain, 372 U.S. 293, 9 L.Ed2nd 770, 83 S.Ct. 745. The Supreme Court of the United States spoke of six circumstances which demand the Federal Court to grant an evidentuary hearing to a habeas corpus applicant. 372 U.S. at page 313, 9 L.Ed2nd at page 786, 83 S.Ct. at page 757.

Appellant desires to again litigate the issue of his presence in the demanding state at the time of the alleged crime. During the trial in the state court, the court received into evidence two exhibits (Plaintiff's Exhibit No.'s 2 and 4) to substantiate his claim as to nonpresence. Furthermore, Appellant had the deposition of one Harry Lee Dodd read into the record to substantiate his claim. Speaking of such, the Supreme Court of Idaho noted:

> ". . . The testimony of Dodd was of a highly questionable nature and the trial court evidently largely discounted the correctness of this testimony (in which conclusion this court concurs, the evidence before that court being wholly documentary in nature). The letter of the sheriff of Muskogee County alone is insufficient to overcome the prima facie case presented, for that does not overcome the allegation and sworn statement that the accused was in Missouri at the time the alleged crime was committed. The findings of the trial court are sustained by the record." Smith v. State, 89 Idaho 70, 77, 403 P.2d 221, 224 (1965)

Dodd is a convicted felon and has been twice adjudicated insane. (Tr. p.22; p.23, L.23.)

II

FEDERAL DISTRICT JUDGE RAY MC NICHOLS CORRECTLY EXERCISED HIS DISCRETION IN REFUSING TO PERMIT APPELLANT TO AGAIN LITIGATE HIS CAUSE DE NOVO.

Appellant certainly cannot suggest Judge McNichols did not have before him a full and complete record of the various prior courts' proceedings. Judge McNichols notes on page 3 of his Opinion that the entire record presented before the United States Supreme Court was made a part of record before his court. This included even all written briefs presented by the parties. The lower court on page 4 of its Opinion even noted that Appellant conceded that a complete and accurate record was before the court. While Townsend v. Sain imposes a mandatory duty on the federal court in certain situations, certainly the federal court still possesses the right to decide in its discretion whether that situation does in fact exist. His opinion recognizes that he perused the record with care and concluded that Appellant had been indeed afforded a full, complete and adequate evidentuary

hearing with the aid of competent counsel.

Another factor of substantial import illustrated by Judge McNichols is that the instant proceeding is not a review of a criminal proceeding against Appellant, but rather only a legal avenue being pursued by a state seeking to have one returned to its jurisdiction for the purpose of affording him a full scope judicial determination of the ultimate issue. At that time, the Appellant will have afforded to him ample opportunity to present any newly discovered evidence. Appellees believe no door of defense which will be available to him in Missouri has been closed or enchroached upon by the considered opinion of Judge McNichols.

III

APPELLANT COMPLETELY FAILED TO OVERCOME THE PRIMA FACIE CASE IN MEETING HIS BURDEN UNDER THE TEST PRESCRIBED BY THE SUPREME COURT OF THE UNITED STATES.

Another matter should be brought to the attention of this Court. Speaking of the provisions of 62 Stat. 822, 18 U.S.C. §3182, the Supreme Court of Idaho in Smith v. State stated:

> "'The rendition warrant must show on its face that the requirements of the law have been fulfilled; namely (1) that the accused has been demanded as a fugitive from justice

> by the executive of the state from which he fled; (2) that he stands charged with the commission of a crime in that state; (3) that a copy of an indictment, or affidavit made before a magistrate, containing the charge, is presented with the requisition, duly certified as authentic. Annotation 89 A.L.R. 595. Such recitals are presumed to be true, and a warrant valid on its face is prima facie sufficient authority for the officer to arrest and deliver the accused.'" 89 Idaho at page 75, 403 P.2d at page 223; quoting from In re Martz, 83 Idaho 72, 75, 76, 357 P.2d 940, 972 (1960).

The governor's rendition warrant is prima facie evidence that the Appellant is a fugitive from justice, and the burden of overcoming this prima facie case is on the Appellant. In re Martz, 83 Idaho 72, 75, 76, 357 P.2d 940, 942 (1960), and cases cited therein; 25 Am. Jur., Habeas Corpus, §72. The magnitude of the burden carried by the petitioner in an extradition proceeding was stated by the Supreme Court of the United States in South Carolina v. Bailey, 289 U.S. 412, 421, 422, 77 L.Ed 1292, 1297, 53 S. Ct. 667, 671 (1933):

> "Considering the Constitution and statute and the declarations of this Court, we may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of the homicide. Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed, and, consequently, could not be a fugitive from her

justice." (Emphasis added.)

The Supreme Court of Illinois in the case of People ex rel. Guidotti v. Bell, 372 Ill. 572, 577, 25 N.E.2d 45, 58, 49 (1940) stated:

> ". . . [T]he most that could be said of the alibi evidence that was offered would be that it might raise a doubt, but it fell far short of the clear and convincing proof required by the decisions of the United States Supreme Court."

In Munsey v. Clough, 196 U.S. 364, 25 S.Ct. 282, 4 L.Ed. 515(1905), the Court had commented on a conflict in evidence bearing on the question of the presence of the petitioner within the demanding state at the time of the commission of the crime:

> "But the court will not discharge a defendant arrested under the Governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

It is Appellees' position that Appellant completely failed in overcoming the prima facie case in meeting his burden under the test prescribed by the Supreme Court of the United States.

IV

AFFIDAVITS ARE ADMISSIBLE ON THE QUESTION OF IDENTITY AND PRESENCE.

The next question to be considered deals with the admissibility of the Affidavits to prove the identity of the Appel-

lant and his presence in the demanding state (Missouri) at the time of the commission of the alleged crime. In rejecting this argument, Mr. Justice McFadden speaking for an undivided court in Smith v. State, 89 Idaho 70, 76, 403 P.2d 221, 224(1965) said:

> ". . . In extradition cases an exception is generally made to the rule that affidavits are considered hearsay evidence and hence inadmissible. I Wigmore, Evidence §24 (3rd ed. 1940); Munsey v. Clough, 196 U.S. 364, 24 S.Ct. 282, 49 L.Ed. 515(1905); People ex rel. Chevlin v. O'Brien, 372 Ill. 640, 25 N.E.2d 4 (1939); United States ex rel. Austin v. Williams, 5 Cir., 12 F.2d 66; Annot., 93 A.L.R.2d 912, at 931, and cases cited therein. In People ex rel. Chevlin v. O'Brien, supra, the Supreme Court of Illinois stated:
>
> "'* * * It was proper to admit in evidence on the habeas corpus hearing all the papers, including the affidavits, which were before the Governor when he issued the warrant. (Citation omitted). The purpose of the admission is to establish upon what the Governor of Illinois found a prima facie case against relator.'"
>
> The affidavits were properly received and considered by the trial court."

In Munsey v. Clough, 196 U.S. 364, 25 S.Ct. 282, 4 L. Ed. 515 (1905) the Supreme Court of the United States quoted from and relied upon an ex parte affidavit in arriving at its decision. The decision has repeatedly been cited for this proposition. See also United States ex rel. Austin v. Williams, 6 F.2d 13 (E.D. La. 1925), affirmed 12 F.2d 66 (5th Cir. 1926).

The Supreme Court of Illinois in People ex rel. Guidotti v. Bell, 372 Ill. 572, 576-77, 25 N.E.2d 45, 48-49 (1939) stated:

> "In this proceeding the judicial department of the government is not trying a lawsuit nor determining the guilt or innocence of a defendant. . . It is not for the judicial branch of government to interfere with a considered order of the executive, unless that order be so palpably and conclusively shown to be wrong as to warrant an inference of fraud or inadvertance.
>
> ". . . The most that could be said of the alibi evidence that was offered would be that it might raise a doubt, but it fell far short of that clear and convincing proof required by the decisions of the United States Supreme Court. The appellant sat in the courtroom, but failed to take advantage of his opportunity to testify in his own behalf, and, since this is a civil suit, his silence could not but be considered by the trial court. . . He chose not to rely upon candor or strength of his own position and, in so doing, made a case under which he is not susceptible to discharge by the rules laid down by the Supreme Court of the United States. "

In that case, the petitioner claimed he was not in the demanding state at the time charged in the complaint and was not the person named. A photograph attached to an affidavit which identified the photograph as that of the person charged was admitted into evidence. The petitioner presented five witnesses who testified in his behalf to the effect that he was not present in the state. It is clear that the appellant in the case now before this court did not present sufficient

proof of discharge under the holding in the Guidotti case.

No case has been found or cited in which a state or Federal court stated that ex parte affidavits are not admissible in habeas corpus proceedings on the issue of identity or presence in the demanding state. Letwick v. State, 211 Ark. 1, 198 S.W.2d 830 (1947) and Notter v. Beasley, 240 Ind. 631, 166 N.E.2d 643 (1960) do stand for the proposition that hearsay evidence on the question of identity is admissible, in form other than that of affidavits. This is the only question on which there is any division of authority whatever.

In the Letwick and Notter cases, the agent of the demanding state stated that a photograph of the petitioner had been identified by persons in the demanding state as the person who committed the crime. The Supreme Court of Indiana defended its position in Notter v. Beasley, 240 Ind. 631, 639, 166 N.E.2d 643, 647 (1960), as follows:

> " . . . We concede this is hearsay testimony. . . but the appellant is not on trial for the commission of the offense in this State. In fact, the issue of his guilt or innocence is not in question here and the constitutional provision that he is entitled to be confronted with witnesses against him for cross examination is not applicable here. If and when appellant is tried for the crime charged in the State of Oklahoma, he will be entitled to be confronted by the witnesses there who seek to identify him. It is there that his identity

must be proved beyond a reasonable doubt--not here. We are sustained in the position we take here by an almost unanimous weight of authority."

Letwick v. State, 211 Ark. 1, 198 S.W.2d 830 (1947) involved a similar state of facts and the Arkansas court accepted the hearsay testimony concerning the identification of the petitioner by others.

The Letwick case had been tried in Texas prior to the Arkansas decision. The Texas court held that the testimony of the agent of the demanding state as to what he had been told by others was not sufficient on the question of identity. Letwick v. State, 145 Tex. Crim.App. 416, 168 S.W.2d 866 (1943). A similar holding by the Texas court is found in the case of Ex Parte Williams, 169 Tex.Crim.App. 192, 333 S.W.2d 146 (1960.) However, the courts of Texas have uniformly held that affidavits from persons in the demanding state on the question of identity and presence in the state were admissible in extradition proceedings. Ex Parte O'Conner, 169 Tex.Crim.App. 559, 336 S.W.2d 152 (1960) and Ex Parte Green, 170 Tex.Crim.App. 311, 340 S.W.2d 821 (1960.)

The courts which have considered this question are unanimous that ex parte affidavits are admissible in extradition proceedings. Annotation, 93 A.L.R.2d 912, at page 931 and cases cited therein.

Dean Wigmore, in his monumental work on evidence, states that there are certain proceedings wherein the common law rules of evidence are not applicable. He mentions ex parte proceedings, interlocutory proceedings, grand jury proceedings, disbarment proceedings and proceedings for fixing sentence. He also includes extradition as one of these special proceedings:

> "For the same reasons of principle, extradition proceedings are not governed in strictness by the jury-trial rules of Evidence. Morever, here the additional reason obtains that the evidence is brought from outside the jurisdiction, and the procurement of evidence is thus likely to be hampered by the lack of power or practicability, as well as by the possible differences of law in another system." 1 Wigmore on Evidence 3rd Ed. §4(6), p. 24.

V

THE RENDITION WARRANT SATISFIES THE REQUIREMENTS OF 62 STAT. 822, 18 U.S.C. § 3182.

Appellant further contends that the rendition warrant of the asylum state (Robert E. Smylie, Governor of the State of Idaho) fails to comply with the requirements of 62 Stat. 822, 18 U.S.C. §3182, when it states the required affidavit was "found in the county" and not that it was "made before a magistrate." The rendition warrant, which is a portion of Exhibit No. 3 of the lower court records, reads in part:

> ". . . Charles E. Smith stands charged by the Affidavit found in the County of Adair in said State. . ."

However, this issue was never presented to the Supreme Court of Idaho by the Appellant, either in his opening brief, filed June 8, 1964, or in his reply brief, filed October 14, 1964. His opening brief, which enumerated the Assignment of Errors and his Points and Authorities, is totally absent of reference to such, as was his written Argument in support thereof. Thus, this Court should not now at this late stage pass on a question never properly presented or adjudicated below.

The affidavit of Vance R. Frick, Prosecuting Attorney within and for the County of Adair, in the State of Missouri is in fact a criminal complaint under oath, and also a part of Exhibit No. 3. The complaint was made before a magistrate of the State of Missouri and was subscribed and sworn to before the same magistrate.

Of further import is an opinion of the Supreme Court of Idaho in 1960. The Governor of Idaho's rendition warrant in In re Martz, 83 Idaho 72, 357 P.2d 940, recited that the individual, "stands charged by the Complaint found in the County of San Diego." Petitioner contended the warrant was invalid because of the recital that he stands charged by "Complaint" instead of "Affidavit" made before a magistrate of the demanding state. The complaint was sworn to by a private citizen before a judge of the Municipal Court of the City of San Diego.

In the instant matter, the affidavit of the prosecutor was in unequivocal, clear, and concise terms, and also sworn to before a magistrate of the demanding state. Rejecting petitioner's argument that the complaint was non-compliance with 62 Stat. 822, 18 U.S.C. §3182, Mr. Chief Justice Taylor, speaking for an undivided court, said:

> "Thus, a criminal complaint sworn to before a magistrate is in fact an affidavit within the meaning of the federal statute authorizing extradition upon the production of a copy of 'an affidavit made before a magistrate.' The great weight of authority supports this conclusion." 83 Idaho at page 77, 357 P.2d at page 943. (Emphasis added.)

The Idaho Supreme Court cited on the same page in support of the above holding, a host of judicial authorities, including opinions of the Supreme Court of the United States and other federal courts' opinions, wherein the Supreme Court of the United States has denied certiorari. Thus, these Appellees believe that Appellant's argument is devoid of merit.

VI

THE COMPLAINT CHARGES A CRIME IN DIRECT AND UNEQUIVOCAL LANGUAGE AND ONLY THE VERIFICATION CONTAINS THE PHRASE, "INFORMATION AND BELIEF."

Petitioner contends that the complaints of the Prosecutor, Vance R. Frick and that of one Olin Johnson, both made before a magistrate of the State of Missouri, were insufficient in that they were executed on "information and belief." In his brief, at page 13, Appellant cites the case of Ex Parte Murray, 112 S.C. 342, 99 S.E. 798 (1919), for the proposition

that an extradition affidavit 'to the best of affiant's knowledge, information, and belief,' without stating that facts were within his knowledge or the sources of his information and belief, is defective and a warrant issued thereon is invalid.

The Murray case does stand for this proposition, and cites Rice v. Ames, 180 U.S. 371, 21 S.Ct. 406, 45 L.Ed. 577 (1901), in support of its holding. In Rice v. Ames, the United States Supreme Court held that where a crime was charged in a complaint "on information and belief," that this was insufficient to charge a crime and therefore such a complaint was not a valid basis for extradition. The complaint on which the petitioner was finally extradited contained four charges, one of which charged a crime on information and belief, and the other three of which did not. The Court said that the first charge was insufficient to be grounds for extradition, but that the remaining three were adequate.

However, in the case at bar, the complaint sworn to by the prosecutor in Missouri, Vance R. Frick, charges a crime in direct and unequivocal terms. (Tr. pp 69,70.) It is only the verification of the complaint which states that the facts set forth in the complaint were true "according to the best knowledge, information and belief" of the prosecutor. This was not the situation in Rice v. Ames. This is seen by the

fact that only one of the four charges contained in the complaint were declared to be inadequate by the Supreme Court. If the Court had been considering a verification, it would, of necessity, had to invalidate the whole complaint. The distinction here is between a complaint which charges a crime "on information and belief", as in Rice v. Ames, and a complaint which affirmatively and directly charges a crime, but is verified as being true according to "knowledge and belief" as is the case before this Court.

Any attempt to draw an anology between the two fact situations is devoid of accuracy. Various cases illustrate the distinct difference. In Ex Parte Davis, 68 Cal.App.2d 798, 158 P.2d 36 (1945), the affidavit concluded that the allegations "are true as I verily believe." A California court had this to say regarding a contention that this was an affidavit made upon "information and belief" and therefore not grounds for extradition:

> "... 'In the case before us the charge in the information is made directly and positively that petitioner committed the offense; it is not asserted that it is made upon information and belief." 68 Cal.App.2d at page 809, 158 P.2d at p. 41.

The case of Ex Parte Brown, 77 Tex. Crim.App. 312, 178 S.W. 366 (1915), is to the same effect. The first paragraph of the complaint charged the crime in positive terms and concluded:

> "This complaint further says that he has just and reasonable grounds to believe, and does believe, Joseph L. Brown committed said offense. Wherefore the said Ed. A. Garvey prays a warrant may issue against the said Joseph L. Brown according to law." 77 Tex. Crim.App. at p. 313, 178 S.W. at p. 366.

The Texas Court held on the same pages noted above that the second paragraph of the complaint did not invalidate the positive and direct charge of the crime in the first paragraph:

> "... The first paragraph of the affidavit is positive and not on information and belief. The second clause does not so modify the first or the whole affidavit as to show it was made on information and belief."

In the case at bar, it is not a paragraph of the complaint following the charge of the crime that contains a statement that the crime was committed by the defendant "to the best knowledge and belief" of the affiant, but is merely the verification made by the prosecutor. The difference between the situation in this case and that of a true case of a complaint made on information and belief is patently shown in the case of People ex rel. Cornett v. Warden of City Prison of Brooklyn, N.Y., 60 Misc. 525, 112 NYS 492 (Sup. Ct. 1908). There the warrant was issued on an affidavit of a City of New York Detective which, in turn, was predicated upon an information sworn to in the Commonwealth of Pennsylvania, which read in part:

> "Before me, the subscriber, . . . personally came Jacob Johnson, County Detective, . . . who upon his solemn oath according to law saith, on information received which he believes true, . . ." 112 N.Y.S at p. 493.

The New York Court said that this was not sufficient to charge Cornett with the crime, and that therefore the Commonwealth of Pennsylvania could not extradite him from the asylum State of New York. The case of Ex Parte Spears, 88 Cal. 640, 26 Pac. 608 (1891), is to the same effect, also illustrating a complaint charging a crime "on information and belief."

The Washington Supreme Court considered a question similar to that presented here, in the case of McClendon v. Callahan, 46 Wash.2d 733, 284 P.2d 323 (1955.) The complaint charged the crime in affirmative terms, but the verification contained the words, "the complaint therein is true, as I verily believe." The Washington Supreme Court quoted at length from State v. Cronin, 20 Wash. 512, 56 Pac. 26 (1899):

> "It is contended that this statute requires a positive affirmation that the matter stated in the information is true, and is not satisfied by an oath that it is true as the affiant 'verily believes.' An information is a pleading. It is the formal statement on the part of the state of the facts constituting the offense which the defendant is accused of committing; in other words, it is the plain and concise statement of the facts constituting the cause of action. It bears the same relation to a criminal action that a complaint does to a civil action; and, when verified, its object is not to satisfy the court or jury that the defendant is guilty, nor is it for the purpose of evidence which

> is to be weighed and passed upon, but is only to inform the defendant of the precise acts or omissions with which he is accused, the truth of which is to be determined thereafter by direct and positive evidence upon a trial, where the defendant is brought face to face with the witnesses. The verification to the information, then, can have but one purpose, viz., to insure good faith in instituting the proceedings, and to guard against vindictive and groundless prosecutions. No good reason can be assigned why this is not accomplished by an oath reciting that the acts or omissions charged are true as the affiant verily believes, as well as by the oath contended for by the appellant. If the charge is falsely, wilfully and corruptly made, prejury can be predicated upon the one form as well as upon the other * * *'" (Emphasis supplied by the court in 46 Wash.2d at p.739, 284 P.2d at p. 327.)

Therefore, it can be seen that other courts have repudiated the contention that the form of the verification of a criminal complaint becomes decisive in an extradition proceeding. To hold that the form was decisive in the case at bar would be to exalt form above substance, and to place a needless technicality in the paths of states seeking to extradite persons charged with crime who have found asylum in other states.

VII

THE SUFFICIENCY OF A COMPLAINT AS A PLEADING IS NOT OPEN TO INQUIRY IN HABEAS CORPUS PROCEEDINGS TO REVIEW ISSUANCE OF A RENDITION WARRANT.

Appellant in his argument 2(d) raises the proposition that the demanding papers were insufficient because the following 2 elements of the charging papers were missing; the demanding papers do not state whether death occurred within a year and a

day of the acts alleged to Appellant, and the same papers do not allege that it was the death of a human being.

Examination of the briefs of Appellant filed before the Supreme Court of the State of Idaho, noted previously, reveals that Appellant never brought to the attention of that court any contention that the demanding papers did not allege that Donna Jean Smith was a human being, or that death occurred within a year and a day. The first mention found of these contentions is on page two of his Petition for Rehearing, filed subsequent to the entry of the Supreme Court of Idaho's formal opinion of June 11, 1965. Appendix A-2 of Petition for Certiorari.

The Petition of Rehearing was denied July 2, 1965, Charles E. Smith v. State of Idaho, 89 Idaho 70, 403 P.2d 221. Thus, this court should not pass on matters never properly passed or adjudicated below. However, Appellees believe that it is of little value that the demanding papers did not allege that Donna Jean Smith was a human being. Murder is recognized throughout the country as the unlawful killing of a human being; reference to the Idaho and Missouri criminal laws are unnecessary. One cannot "murder" an animal or creature not a member of the human race. Black, Law Dictionary (4th ed.1951) defines murder as:

> "The unlawful killing of a human being by another with malice aforethought, either express or implied."

Appellant cannot seek solace in his brlief that the demanding papers did not specify whether death occurred within a year and a day. Appellees believe it is well recognized that when a rendition warrant shows on its face that one stands charged with the commission of a crime in the demanding state. The recital is presumed to be true, and the warrant on its face is prima facie sufficient authority for the officer to arrest and deliver the accused. Smith v. State, 89 Idaho 70, 75, 403 P.2d 221, 223 (1965). Appellant's brief on page 24 quotes the applicable statute of the State of Missouri relating to murder in the first degree. The Supreme Court of Idaho was previously presented with a suggestion that essential elements were omitted from the complaint of the demand state, Missouri. Its comments in refuting such are appropo to the case at bar, and found therein is an extensive list of citations in support thereof:

> "The complaint before the trial court charged the commission of murder in the first degree in general terms as defined by the Missouri statute. Whether it complies with the requirements of the Missouri law as to the details required to be set out is not for this court to say. The general rule in extradition matters is that the sufficiency of the affidavit, or indictment as a pleading is not open to inquiry on habeas corpus proceedings to review issuance of a rendition warrant. See: Starks v. Turner, 365 P.2d 564 (Okla.Ct.Cr.App.1961); Ex parte Paulson, 168 Or. 457, 124 P.2d 297(1942); 39 C.J.S. Habeas Corpus §39, p. 554; 25 Am.Jur. 195, Habeas Corpus §69; Annots., 81 A.L.R. 552, at 565, and 40 A.L.R. 2d 1151, at 1159; 4 Anderson, Warton's Criminal Law and Procedure § 1667 (1967)" Smith v. State, 89 Idaho 70, 76, 403 P.2d 221, 224 (1965).

VIII

THE REQUIREMENT OF THE PRESENCE OF AN AGENT WITHIN A DEFINITE TIME OFFERS APPELLANT NO DEFENSE IN THE PRESENT LITIGATION.

Appellant's argument found on pages 15-17 of his brief contains an ingenious theory that he should be discharged from custody because no agent appeared within thirty (30) days from the time of the arrest and thus non-compliance with 62 Stat. 822, 18 U.S.C. §3182. Governor Robert E. Smylie's rendition warrant was issued on the 16th day of April, 1963. However, Appellant petitioned for the issuance of the Writ of Habeas Corpus, shortly thereafter, May 9, 1963. The order for issuance of the writ, the writ itself, and service of the writ were all dated May 9, 1963. (Tr. p.29, 41, 43, 44.) While not only was this new issue never presented by Appellant in his previous litigation, it is fairly obvious that Appellant's own actions have prevented the appearance of any agent and final completion of the extradition proceedings.

CONCLUSION

The Supreme Court of the United States, in 1917, explained in unmistakable language the constitutional rationale of interstate extradition. Mr. Justice Clarke, speaking for the Court in Biddinger v. Commissioner of Police, 245 U.S. 128, 132, 133, 62 L.Ed 193, 198, 38 S.Ct. 41, 42, 43, said:

> "The provision of the Federal Constitution quoted, with the change of only two words, first appears in the Articles of Confederation of 1781, where it was used to describe and to continue in effect the practice of the New England colonies with respect to the extradition of criminals. [Authorities omitted.] The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one state and asylum against the processes of justice of another. [Authorities omitted.] Such a provision was necessary to prevent the very general requirement of the state constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than the defense for the innocent, which it was intended to be. Its design was and is in effect, to eliminate, for this purpose, the boundaries of states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land.
>
> "Such being the origin and purpose of those provisions of the Constitution and statutes, <u>they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally, to effect their important purpose,</u> with

the result that one who leaves the demanding state before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, or who, having committed a crime in one state, returns to his home in another, is nevertheless decided to be a fugitive from justice within their meaning. [Authority ommitted.]

"Courts have been free to give this meaning to the Constitution and statutes because, in delivering up an accused person to the authorities of a sister state, they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution, but in the manner provided by the state against the laws of which it is charged that he has offended." (Emphasis added.)

Repeating the comments on an early United States Supreme Court, the Illinois Supreme Court in People ex rel. Guidotti v. Bell, 372 Ill. 572, 576, 25 N.E.2d 45, 48 (1940) remarked:

". . . We may repeat the thought expressed in Appleyard's Case [203 U.S. 222, 27 S.Ct. 122, 51 L.Ed. 161, 7 Ann.Cas. 1073], above cited, that a faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the states, and that 'while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Consitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.'"

Appellees ask this Court to affirm the decision of

Federal District Judge Ray McNichols.

Respectfully submitted,

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Service of a true and correct copy of the foregoing brief of Appellees is hereby acknowledged this _____ day of October, 1966.

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CERTIFICATE

I certify that in connection with preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit; and that, in my opinion, the foregoing brief is in full compliance with those rules.

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